

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



Docket  
No.

76-6178

To be Argued by:  
Richard K. Hughes

In The  
**United States Court of Appeals**  
For the Second Circuit

NORMAN M. CAMPBELL,

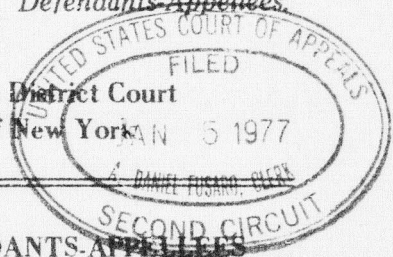
Plaintiff-Appellant,

— against —

F. DAVID MATHEWS, Secretary of Health, Education and  
Welfare and Housing and Urban Development, Town of  
Colonie, William K. Sanford, Supervisor,

~~Defendants-Appellees.~~

Appeal from the United States District Court  
for the Northern District of New York



BRIEF FOR FEDERAL DEFENDANTS-APPELLEES

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In The  
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NORMAN M. CAMPBELL,

*Plaintiff-Appellant,*

— against —

F. DAVID MATHEWS, Secretary of Health, Education and  
Welfare and Housing and Urban Development, Town of  
Colonie, William K. Sanford, Supervisor,

*Defendants-Appellees.*

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Appeal from the United States District Court  
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BRIEF FOR FEDERAL DEFENDANTS-APPELLEES

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STATEMENT OF ISSUE

IS THERE PROPER JURISDICTION IN THE UNITED STATES DISTRICT COURT, WITH RESPECT TO THE FEDERAL GOVERNMENT, OVER ANY CLAIMS FOR RELIEF OF THE PLAINTIFF, NORMAN M. CAMPBELL, CHALLENGING THE ACQUISITION OF EASEMENTS THROUGH PLAINTIFF'S LAND BY THE GRANTEE, TOWN OF COLONIE.

STATEMENT OF THE CASE

This civil action was commenced by the plaintiff, NORMAN M. CAMPBELL, appearing *pro se*, against, F. DAVID

MATHEWS, Secretary of the U.S. Department of Health, Education and Welfare, the Secretary of the U.S. Department of Housing and Urban Development, and WILLIAM K. SANFORD, Supervisor of the Town of Colonie, New York, on July 20, 1976. The plaintiff's original pleadings appear to challenge the local defendant's exercise of the sovereign power of eminent domain and the federal defendants'<sup>1</sup> partial funding of the Salt Kill North Trunk and Collection Sewer System Project, located in the Town of Colonie.

Annexed as exhibits to the plaintiff's original complaint, which makes no demand for relief, are copies of a notice of petition in condemnation proceedings, commenced against the real property of the plaintiff by the local defendant in state court under Article 2 of the New York Condemnation Law, and a professional engineer's survey map of the proposed project and the easement to be granted to the Town of Colonie with respect to the lands alleged owned by NORMAN M. CAMPBELL.

On August 13, 1976, the federal defendants, by their attorney, filed a motion to dismiss the plaintiff's complaint, pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, on grounds that the United States District Court lacked jurisdiction over the subject matter of this action and the plaintiff's pleadings failed to state a claim upon which

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<sup>1</sup> The plaintiff has incorrectly named as the federal defendants in this action, F. DAVID MATHEWS, Secretary of Health, Education and Welfare, and the Department of Housing and Urban Development. The proper federal defendants, if any, would be Russell E. Train, Administrator of the United States Environmental Protection Agency, the federal agency that is funding 75% of the eligible costs of the subject project, and/or Gerald M. Hansler, Regional Administrator of that agency, who has approved the grant application of the Town of Colonie for this project.

relief could be granted against the federal defendants. On September 14, 1976, the local defendant, by his attorney, filed a similar motion to dismiss the complaint.

On the return date of the defendants' motions to dismiss, September 20, 1976, the plaintiff served upon the attorneys for the defendants, his amended complaint with its several exhibits. These amended pleadings also aver a deprivation of plaintiff's civil and constitutional rights by unnamed Town of Colonie law enforcement officers. NORMAN M. CAMPBELL, a former mental health patient at the Hudson River State Hospital in Poughkeepsie, New York, in his amended complaint, sets forth the history of his frequent court challenges to condemnation proceedings instituted by both private utilities and municipal corporations, which began in August, 1958.

One of the exhibits to the plaintiff's amended complaint is an affidavit signed by one of the practicing engineers for the subject project, sworn to on June 22, 1976 and presented to the state court in support of the Town of Colonie's application for immediate and temporary possession of the plaintiff's lands, for the orderly construction of the Town's sewage system, under Section 24 of the New York Condemnation Law.

Mr. Campbell concluded his amended complaint by requesting that the (District) Court declare the subject project "null and void for the reason that it is not truly necessary."

By endorsement on the local defendant's Notice Of Motion To Dismiss Complaint, on September 20, 1976, the Hon. James T. Foley, Chief U.S. District Judge, after hearing oral argument from all parties, granted the defendants' motions and ordered the dismissal of the plaintiff's pleadings, for lack of jurisdiction and for failure to state a claim upon which relief can be granted. On that same date, judgment was entered in favor of the defendants by the Clerk of the U.S. District Court, and the plaintiff's appeal from that order and judgment brings the matter before the U.S. Court of Appeals.



The real property of the plaintiff is located on the survey maps of the subject project. The Salt Kill North Project involves the construction of six collection sewer lines that will be connected to an existing sewage treatment facility for the County of Albany.

The original application of the Town of Colonie for federal assistance under the Federal Water Pollution Control Act, Title 33, United States Code, Sections 1251, et seq., was approved by E.P.A. Regional Administrator Gerald M. Hansler on June 10, 1974, and sought federal funding of 75% of the eligible project costs of \$1,942,500.00 or \$1,456,875.00,<sup>2</sup> for construction of wastewater treatment works in that Town.

Originally, the Town of Colonie wastewater project, designated Project No. C-36-781, was scheduled to be completed in December, 1975, at a total cost of \$2,887,100.00. However, since its original execution, the original Grant Agreement will have been amended by the parties on two separate occasions: (1) in March-April, 1975, to reduce the amount of project eligible construction costs from \$1,456,875.00 to \$1,295,250.00, as a result of actual bids received by the grantee from contractors, and (2) in December, 1976, upon completion of all required environmental impact review procedures by E.P.A.,<sup>3</sup>

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<sup>2</sup> The grantee's costs of site acquisition, i.e., land, structures and right-of-way, the latter being at issue here, in the projected amount of \$78,000.00, are not reimbursable costs under 40 C.F.R. Section 35.940-2(h).

<sup>3</sup> On October 20, 1976, E.P.A. Regional Administrator Gerald M. Hansler issued a negative declaration statement, under the National Environmental Policy Act of 1969, 42 United States Code, Sections 4321 et seq., for Project No. C-36-781.

to include, among other systems, the Salt Kill North Trunk and Collection System, allegedly the subject of this litigation. The total, anticipated eligible project cost is presently established as \$3,622,500.00, of which \$2,716,875.00 will be federally funded by E.P.A. .

The plans and specifications of the grantee, Town of Colonie, indicate that an eight inch lateral sewer line will be constructed below the surface of the earth on both sides of a state highway, Columbia Street, in the vicinity of plaintiff's property. Since Columbia Street is a state highway, construction of the present line under Columbia Street, and any future, related construction, would have required compliance with New York State Department of Transportation regulations and would have made this project unnecessarily and prohibitively expensive. As an alternative method, easements have been, or will be obtained by the Town of Colonie, either voluntarily, or by condemnation from individual property owners, including NORMAN M. CAMPBELL, whose property is situated on either side of Columbia Street. This alternative method will allow construction outside the route of the state highway, and will eliminate the necessity of compliance with state regulations.

#### ARGUMENT

THERE IS NO JURISDICTION IN THE UNITED STATES DISTRICT COURT, WITH RESPECT TO THE FEDERAL GOVERNMENT, OVER ANY CLAIMS FOR RELIEF OF THE PLAINTIFF, NORMAN M. CAMPBELL, CHALLENGING THE ACQUISITION OF EASEMENTS THROUGH PLAINTIFF'S LAND BY THE GRANTEE, TOWN OF COLONIE.

It appears from the original and amended pleadings of the plaintiff that Mr. Campbell, a long-standing opponent of condemnation proceedings, objects to the involuntary taking of an easement through his property by the grantee, Town of Colonie, for its development of the Salt Kill North Lateral Collection Sewer Project in the northern section of that Town.



Exhibits to both plaintiff's pleadings indicate that the respective rights of the proper parties, NORMAN M. CAMPBELL and the Town of Colonie, in this real property will be determined in the proper forum, the Supreme Court of the State of New York for the County of Albany, under Article 2 of the New York Condemnation Law.

Under Section 201(g)(1) of the Federal Water Pollution Control Act, Title 33, United States Code, Section 1281(g)(1), "(t)he Administrator, (of the United States Environmental Protection Agency), is authorized to make grants to any State, municipality, or intermunicipal or interstate agency for the *construction* of publicly owned treatment works." (Emphasis added). Section 212 of that Act, Title 33, United States Code, Section 1292(1) defines the term, "construction".

Under the applicable regulations promulgated by the Administrator under this Act, 35 C.F.R. Section 35.940-2(h), site acquisition by the grantee, including easements and sewer rights-of-way, are not reimbursable costs. Acquisition of real property for the construction of waste treatment facilities, must be conducted by the grantee in accordance with the provisions of 40 C.F.R. Section 4.600 et seq. to assure the property owner of just compensation. 40 C.F.R. Section 35.936.

There are no allegations in the plaintiff's pleadings, nor could there be, of any federal involvement in the Town of Colonie's pending condemnation proceedings. The plaintiff's averments concerning partial federal funding of the subject project are incomplete and do not allege the fact that only certain costs of the grantee, not including right-of-way appropriation, are eligible for reimbursement by E.P.A., under the Act. Mr. Campbell's dispute against the local sponsor must be resolved in the proper forum, i.e., the state court under Article 2 of the New York Condemnation Law and not in the U.S. District Court.

CONCLUSION

For all the foregoing reasons, the order and judgment of the United States District Court for the Northern District of New York should in all respects be affirmed.

Respectfully submitted,

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# Affidavit of Service

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January 4, 1977

Re **Norman M. Campbell vs. F. David Mathews, et al.**

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**EVERETT J. REA,**

Being duly sworn, deposes and says: That he is associated with Spaulding Law Printing Co. of Syracuse, New York, and is over twenty-one years of age.

That at the request of **Paul V. French, U.S. Attorney for the Northern District of New York,**

Attorney ☒ for **Appellees,**

☒ he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix  
of the above entitled case addressed to:

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573 Columbia Street  
Cohoes, New York 12047

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Post Office maintained by the United States Government in the City of Syracuse, New York, on

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January 4, 1977.

*Everett J. Rea*  
EVERETT J. REA

Sworn to before me this **4th** day of **January, 1977.**

*Thomas J. Lutz*  
Notary Public

Commissioner of Deeds

cc: **Paul V. French, Esq.**